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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Appeal from Pickens County
In the Court of Common Pleas
Hon. Alex Kinlaw, Jr. and Hon. Perry H. Gravely

2022-001499

Click Properties, LLC and Hyper Formance, LLC…….Respondents,

Versus

Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC……Appellants.

PETITION FOR REHEARING

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March 27, 2025.

NOW INTO COURT, come the Appellants Thomas SC Properties, LLC and All-Tech Tire and Auto Repair, LLC, who respectfully submit the following Petition for Rehearing, pursuant to Rule 221 of the S.C. Rules of Appellate Practice, for the following reasons, to wit:

The Court of Appeals in its opinion No. 6105 of March 12, 2025, respectfully overlooked and/or misapprehended the issues and arguments submitted by the Appellants in brief as to both Respondents, Click Properties, LLC and Hyper Formance, LLC, as discussed *infra*. The Appellants respectfully request that this Honorable Court grant the Appellants' Petition and reverse the orders of Honorable Judges Alex Kinlaw, Jr. and Perry H. Gravely.

I. **The Court of Appeals erred in affirming the trial court's denial of the Appellants' motion to amend its answer to include a counterclaim for a declaratory judgment.**

The Court of Appeals has erred in affirming the order of Honorable Judge Alex Kinlaw, Jr. denying the Appellants' motion to file an amended answer to include a counterclaim. This Court does not find reversible error but finds that if there were an error made by the trial judge the error is harmless as the issue of the parties' use of the property was presented to the jury in the claims for acquiescence and prescriptive easement. However, these claims were only permitted to be furthered by the Respondents, rather than the Appellants. Further, with this Appellate Court's opinion, it is clear that there would have been no prejudice to permit the amendment as the claims would be addressed and adjudicated in the Respondents' case-in-chief. It was clearly erroneous for the trial court to deny amendment to the Appellants pursuant to the facts of this case. The Respondents in this matter could not have been prejudiced by the amendment, contrary to the findings of Judge Kinlaw, due to the fact that the issues were already pending in their complaint. However, although Judge Kinlaw found that the issue was already pending in the Respondents' third cause of action requesting a declaratory judgment to quiet title

as to the common property line of the parties, and that the proposed amendment would be futile to the Appellants, the Respondents actually abandoned this cause of action at the outset of the trial in pre-trial matters before Judge Gravely – further bolstering the amendment motion by the Appellants and exhibiting the need for the amendment. (R. pp. 22-24) Judge Kinlaw should have permitted the Appellants to amend their answer to include a counterclaim as discussed, *supra,* and this Honorable Appellate Court should grant the Appellants' Petition for Rehearing and reverse the order of Judge Kinlaw.

II. **The trial court erred in denying the Appellants' Motion to Dismiss this matter.**

The Court of Appeals has erred in affirming the order of Honorable Judge Perry H. Gravely denying the Appellants' Motion to Dismiss in summary fashion by merely finding that the Respondents' various causes of action have been properly plead without making specific factual findings to support the order. In the case at bar, the Appellants' trial counsel submitted a sound Memorandum in Support of the Appellants' Motion to Dismiss. Specifically, after providing a recitation of the Facts, Appellants' counsel asserted that the Respondents' claims for nuisance, negligence, acquiescence, and prescriptive easement (the causes of action that ultimately remained for the jury's verdict), all must fall. Of particular concern to the Appellants is the nuisance claim of Respondents due to the fact that Judge Gravely entered an order following the trial of this matter requiring the Appellants to abate the nuisance – seemingly adding to the jury's verdict of award of damages for nuisance (which is discussed in more detail *infra*) – a point that this Honorable Appellate Court did not address and overlooked in its Opinion. As Appellants' trial counsel asserted, a nuisance claim is wholly inapplicable to excavation that allegedly caused erosion and damage to structures on the Respondents' property.

The claim of nuisance simply does not fit the allegations and facts of this case, and this Court and Judge Gravely erred in denying the Appellants' Motion to Dismiss on nuisance.

This Court and Judge Gravely further erred in denying the Appellants' Motion to Dismiss regarding the claim of negligence. As Appellants' counsel asserts in Memorandum In Support of Appellants' Motion to Dismiss, the Respondents' negligence claim fails because the complaint does not allege a duty of care and does not meet South Carolina pleading standards. The only allegations of the Complaint in this matter are that Thomas owed a duty "not to harm others and not to unreasonably interfere with the rights of adjoining landowners," which is not an actionable duty of care under South Carolina law. Additionally, as trial counsel asserted, the Respondents alleged specific breaches of duty without identification of the legal duties that were breached. Respondents alleged that Thomas "failed to properly supervise the excavation of its premises," but failed to state a legal standard or basis on which a landowner owes a legal duty to supervise activities on the landowner's private premises. Further, Respondents failed to identify an actionable basis for protective, preventative or cautionary duties owed to the Respondents in Paragraph 32, subparagraphs (a), (c), (d) or (e) of the Complaint. The Respondents further failed to identify the specific harm or articulate how the alleged actionable harm was foreseeable.

Regarding the claims for acquiescence and prescriptive easement, these claims cannot co-exist as the claim for prescriptive easement requires "hostility" while a claim for acquiescence requires "mutual intent to agree to a particular property line." *Paine Gayle Properties, LLC v. CSX Transp., Inc.* 400 S.C. 568 (2012); *Croft v. Sanders*, 283 S.C. 507, 510 (S.C. App. 1984). This Appellate Court and the trial court both erred in denying the Appellants' motion to dismiss, and this Honorable Court should grant the Appellants' Petition for Rehearing and reverse the order of Judge Gravely.

III. **The Court of Appeals and the trial court erred in denying the Appellants' Motions for Directed Verdict.**

This Honorable Appellate Court has misapprehended the facts as applied to the legal principles presented in this case by affirming the denial of the Appellants' Motions for Directed Verdict. Following the receipt of all evidence and testimony from the Respondents in this matter and subsequent to the Respondents resting, the Appellants moved for directed verdict on the remaining causes of action that were pursued by the Respondents in their case-in-chief -- nuisance *per se*, negligence, prescriptive easement, acquiescence, and injunctive relief. (R. p. 1057, et seq.) In ruling on a motion for directed verdict, a court must view the evidence and all reasonable inferences in the light most favorable to the non-moving party. id. When the evidence yields only one inference, a directed verdict in favor of the moving party is proper."); *Wright v. Craft*, 372 S.C. at 19, 640 S.E.2d at 496 (Ct. App. 2006)

a. There is no viable cause of action for nuisance *per se* as the Respondents did not present evidence that there exists a condition that is "dangerous at all times and under all circumstances."

The test for determining the existence of a nuisance *per se* in South Carolina is "whether the nuisance has become dangerous at all times and under all circumstances to life, health, or property." *Suddeth v. Knight*, 280 S.C. 5400, 545, 314 S.E.2d 11, 14 (Ct. App. 1984). In this case, Respondents assert that Appellants' excavation work that was done in August 2018 is a nuisance *per se*. (R. pp. 45-57) However, there is no evidence that the excavation performed on the Thomas Property is dangerous "at all times and under all circumstances." Brent Click and his wife Shelly Click both testified that they have continued to use the gravel driveway adjacent to where the excavation work was completed on a regular basis to access the back building and the apartment inside it. (R. pp. 192-265). Over three years after the excavation work was done, Respondents had no evidence of danger under all circumstances from the grading. Respondents'

own expert—David Hall—provided a report on April 22, 2022 that showed the slope that was graded at the back of the Thomas Property is safe and stable. While Mr. Hall alleged that the front slope is unsafe, the cross-section diagram he submitted shows that the potential area of slope failure is 40 feet away from Respondents' buildings and 10 feet away from the property line. (R. pp. 222-223) This certainly cannot demonstrate a nuisance that is "dangerous at all times and under all circumstances to life, health, or property." *Suddeth*, 280 S.C. at 545, 314 S.E.2d at 14.

Additionally, Mr. Hall could not testify that the slope was currently failing, only that it could fail in the future. (R. pp. 244-253) ("Now, impending failure doesn't mean it's going to fail in a week, two weeks, two years. We don't know.") South Carolina nuisance law further elaborates that "mere fears of the plaintiff" are insufficient to support a cause of action for nuisance. *Emory v. Hazard Powder Co.*, 22 S.C. 476, 483 (1885). There are no reported cases in South Carolina where a plaintiff has successfully made a showing of anticipatory nuisance. *See Welborn*, 247 S.C. 554, 148 S.E.2d 375 (denying injunctive relief against proposed automobile wrecking service); *Moss v. South Carolina State Highway Dep't*, 223 S.C. 282, 75 S.E.2d 462 (1953) (refusing to issue temporary restraining order against relocation of highway); *Emory v. Hazard Powder Co.*, 22 S.C. 476, 483 (1885) (stating that "mere fears of the plaintiff" are insufficient basis for nuisance action); *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 351 S.E.2d 168 (Ct. App. 1986) (denying injunctive relief against proposed sewage treatment plant); *Charleston Comm. for Safe Water v. Commissioners of Pub. Works*, 286 S.C. 10, 331 S.E.2d 371 (Ct. App. 1985) (holding that plaintiff failed to meet burden of showing that proposed fluoridation of city's water supply would constitute a nuisance). Thus, as a matter of law, Respondents' claim for nuisance *per se* cannot survive based on speculation of potential future

failure of the front slope. Therefore, this Appellate Court and Judge Gravely erred in denying the Appellants' motion for directed verdict and the order should be reversed by the Appellate Court.

b. Respondents have no evidence of damages resulting from the excavation work on the Thomas Property, and the Respondents' claim for negligence against the Appellant must fall.

Respondents assert that the excavation work on the Thomas Property in 2018 caused damages to the back building of the Click Property. To support this theory, Respondents point to cracks in the floor of the back building and cracks in the cement block wall. However, Respondents cannot link these cracks to the excavation work performed on the Thomas Property. Greg Porter and Jessie Lingerfelt have both provided affidavits affirming that the cracks in the floor of the back building were there even before Click purchased the property. (R. pp. 254-259) Respondents have no contradictory evidence. Mr. Hall has no personal knowledge of when the cracks occurred. (R. p. 250) He relies solely on Mr. Click's testimony and a blurry photograph. (R. p. 250; R. p. 253) Shelly Click testified that damages were on the opposite side of the back building from where the excavation took place. (R. p. 242.) No inspection was conducted of the Click Property prior to Respondents' purchase of it which could show the condition of the slab prior to the excavation. (R. pp. 230-231) Additionally, it defies logic that the cracks in the back building were caused by the excavation work. Along the western side of the back building on the Click Property, Mr. Click had a concrete slab poured in October 2014. (R. p. 229) This slab is between the area of excavation and the back building. Civil engineer Paul Mills examined the outside slab and observed no cracking in it. (R. pp. 260-262) If the excavation work had caused damage to the inside floor of the back building, it also would have caused damage to the closer outside slab. Thus, Respondents have no evidence of damages that arose after the excavation

work nor do Respondents have any evidence that would link the alleged damages to the excavation. Further, there is no credible evidence of the value of the alleged damages. In discovery, Respondents asked for an itemization of damages, the value of such damages, and an explanation as to how and by whom the amount was calculated. (R. pp. 263-265) Respondents responded that Brent Click could testify as to the current value and diminution in value of the Click Property. Mr. Click is not an appraiser and has no real estate experience. Mr. Click cannot speculate as to the value of his property based on some other unknown and unidentified "industrial properties" that have come on the market at some point after 2017. Thus, there is no admissible evidence as to the value of the damages Respondents allege. As Respondents cannot make these evidentiary showings of damages and proximate cause, their nuisance *per se* and negligence claims fail as a matter of law. *See, e.g.* Doe v. Batson, 345 S.C. 316, 548 S.E.2d 854 (2001) (damages and proximate cause are required elements of negligence claim); *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 543 S.E.2d 563 (2001) (nuisance requires a showing of interference with the use and enjoyment of plaintiff's property proximately caused by the defendant).

Additionally, the Appellants presented evidence to the trial court in the form of a YouTube video and screen shots upon information and belief uploaded by agents of the Respondents which shows "abundantly clear" extensive and noticeable cracking in the floor/foundation inside of the upper building of Mr. Click's property prior to the Appellants' excavation work, which began in 2018. (R. pp. 337-373) At trial, Brent Click testified that he made the video in 2013. (R. pp. 337-373; R. p. 802, lines 10-24.) This Appellate Court and Judge Gravely have erred in denying the Appellants' directed verdict motion and the order must be reversed.

c. Respondents' claim of acquiescence fails because Respondents have provided no evidence that any owners of the Thomas or Click Properties ever agreed the true boundary line was such that the turn-around area was on the Click Property.

The Appellate Court and the trial court both have misapprehended the facts of this case as applied to the law of acquiescence. Acquiescence is a very particular claim and requires a mutual intent to agree to a particular property line. "Absent recognition by both [parties] that a particular line constituted the true property line, a new boundary [can] not be established by acquiescence." *Croft v. Sanders*, 283 S.C. 507, 510 (S.C. Ct. App. 1984) Acquiescence by one party is not sufficient. *Pittman v. Lowther*, 363 S.C. 47 (S.C. 2005) In this case, the Respondents have provided absolutely no evidence that any owners of the Thomas or Click Properties—including Brent Click himself—ever agreed that the boundary line was anywhere other than that shown on the 1996 Plat. (R. p. 1374) Mr. Click testified that he was given the 1996 Plat after he closed on the property and that Mark Smith, the prior owner, affirmed the property lines conveyed in the Plat. (R. p. 232) Further, Mr. Click had surveyors come out to his property after he purchased it and locate the property pins, which were as shown on the 1996 Plat. (R. p. 234) Mr. Click then informed Mr. Thomas of where the property lines were, in accordance with the 1996 Plat. (R. pp. 236-237) Finally, Mr. Click testified that Jimmy Watkins, prior owner of the Thomas Property, specifically acknowledged the location of the property line, which was consistent with the placement shown on the 1996 Plat. (R. p. 235) Respondents have no basis to assert that there was acquiescence by the parties to a different property line, and without that specific evidence, Respondents' claim for acquiescence cannot stand.

d. Because the Respondents' use of any portion of the Thomas property was permissive, Respondents' claim for prescriptive easement fails as a matter of law.

The Court of Appeals and the trial court have misapprehended the facts as applied to the law of prescriptive easement in this case – particularly in the face of the jury's inconsistent parallel finding of acquiescence. This Court seems to acknowledge in its Opinion that the legal theories of prescriptive easement and acquiescence are inconsistent in holding that the court "agrees with the circuit court that the jury found Respondents were entitled to use of the disputed property and 'whether prescriptive easement or acquiescence are inconsistent or not the practical effect is the same.'" These inconsistent findings by the jury illustrate a fundamental misunderstanding by the jury of the legal concepts presented by this case – which findings both must fall and have now been affirmed by this Appellate Court in a published opinion. South Carolina law is "well-established that evidence of permissive use defeats the establishment of a prescriptive easement because use that is permissive cannot also be adverse or under a claim of right." *Bundy v. Shirley*, 412 S.C. 292, 310, 772 S.E.2d 163, 173 (2015). *See also Paine Gayle Properties, LLC v. CSX Transp., Inc.*, 400 S.C. 568, 586, 735 S.E.2d 528, 538 (Ct. App. 2012); *Horry Cnty. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993; *Williamson v. Abbott*, 107 S.C. 397, 401, 93 S.E. 15, 16 (1917) Prior owners of the Thomas Property allowed owners and renters of the Click Property to use the turn-around area. (R. pp. 254-259) Because the use of the area was permissive, there can be no claim of adversity or hostility. Thus, Respondents' claims for adverse possession and prescriptive easement fail as a matter of law and the Appellants' petition should be granted.

e. Because all Respondents' other claims fail as a matter of law, there is no basis for injunctive relief.

Respondents do not have evidence sufficient to make a claim to Thomas SC Properties, LLC's private property. Therefore, there is no basis for this Court to enter an order for injunction

restricting Appellants' use of the Thomas Property – a point wholly overlooked by this Honorable Appellate Court in its Opinion.

IV. **The trial court erred in denying the Appellants' Post-Trial Motions and Motion to Reconsider.**

The Appellate Court has affirmed the post-trial motions of the trial court in summary fashion, overlooking and misapprehending the facts as applied to the legal principles presented in this case as described, *supra.* All arguments are fully incorporated into this petition as if wholly reproduced herein. Following the presentation of all evidence in this case, and following the entry of the jury's verdict in this matter, the Appellants filed Appellants' Post-Trial Motions on June 3, 2022, which were a judgment notwithstanding the verdict (JNOV) on all claims or, in the alternative, for a new trial. (R. pp. 558-566) Additionally, in the trial court's order the court found that the Appellants argued the doctrine of "Thirteenth Juror" during the hearing and ruled on the motion. (R. pp. 27-44) In ruling on a JNOV motion, the trial court is required to view the evidence and inferences that reasonably can be drawn therefrom in the light most favorable to the nonmoving party. *Williams Carpet Contractors, Inc. v. Skelly*, 400 S.C. 320, 325, 734 S.E.2d 177, 180 (Ct. App. 2012.) The Post-Trial Motions included legal argument as applied to the facts, which have been addressed by Appellants in brief as well as in Section III, *supra*, and all arguments are fully incorporated by reference herein. This Honorable Appellate Court has erred in affirming the order of Judge Gravely and the Appellants' petition for rehearing should be granted.

CONCLUSION

The Appellants respectfully pray that this Honorable Appellate Court will grant the Appellants' Petition for Rehearing, and reverse the Orders of the Trial Courts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this date, March 27, 2025, I have served the Appellant's Petition for Rehearing on opposing counsel to their respective **E-MAIL** address, pursuant to the Order of the Supreme Court Appellate Case No. 2020-000447(g)(3).

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Respectfully Submitted,

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March 27, 2025

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RE: Click Properties, et al, v. Thomas SC Properties, LLC, et al
Appellate Case No. 2022-001499

Dear Madam Clerk,

Enclosed please find the Appellants' Petition for Rehearing, and a Certificate of Service. I will forward the filing cost of fifty dollars ($50.00) by U.S. Mail.

Please let me know if you have questions regarding the enclosed. With kind regards, I remain

Very Truly Yours,

s/Scarlet B. Moore

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